Supreme Court, U.S.
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No. 88-1969

In The

Supreme Court of the United States

October Term, 1988

JACK McCORMICK,
Warden of the Montana State Prison,

Petitioner,

v.

BERNARD J. FITZPATRICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

MARC RACICOT
Attorney General
KATHY C. SEELEY*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401
(406) 444-2026

*Counsel of Record

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United States Code, 28 U.S.C. § 2254 1

The respondent, Fitzpatrick, in his opposing brief, states, regarding the conflict of interest issue, that the petitioner makes no claim that the Court of Appeals made any error of law. The petitioner's argument on the issue actually includes two prongs: (1) the Court of Appeals exceeded its proper scope of review by ignoring findings of historical fact of the state district court and (2) the opinion of the Court of Appeals conflicts with opinions of this Court because it misapplied the law to the facts.

The Court of Appeals did exceed its proper scope of review under 28 U.S.C. § 2254(d) when it ignored findings of historical fact of the state district court. Fitzpatrick argues in his opposing brief that there is no disagreement as to the historical facts, but then proceeds to make several misstatements of fact. For example, Fitzpatrick incorrectly states that Adams never asserted by implication or otherwise that Bad Horse was the culprit. Respondent's Brief at 5-6. On page 6 of his brief, respondent sets forth facts implicating Bad Horse which he indicates were elicited by the prosecution. That paragraph includes the following:

> In contrast, Bernard Fitzpatrick was completely ignorant of Hardin and the surrounding areas. Tr. trans. 51-53 (victim's vehicle found in remote area, one that required some knowledge of the terrain), 198 (Mr. Bad Horse familiar with the location of the victim's car), 266 (Mr. Fitzpatrick and Mr. Radi not familiar with the area). Upon his arrest, Paul Bad Horse immediately arranged with Edwin Bushman to create a false alibi, Tr. trans. at 180, 333, and to remove any traces of incriminating evidence from Mr. Bushman's car, Tr. trans. at 225-27. Ms. Finch heard

> Mr. Bad Horse and Mr. Holliday discussing a gun, Tr. trans. at 328-29, and even Edwin Bushman testified that Paul Bad Horse had handled the gun seen at Gary Radi's house, Tr. trans. at 204.

Respondent's Brief at 6. Every citation quoted above, except for the citation to page 180 of the transcript, is a citation to *cross-examination* of prosecution witnesses by Adams. All of these facts were elicited by Adams. Adams also brought out other testimony suggesting the crime was committed by Bad Horse. (*See, e.g.*, Tr. 232, 327, 334-35, 652-55.) Adams additionally argued to the jury that Bushman and his companions, including Paul Bad Horse, could have committed the crimes.[1] (Tr. 1276-83, 1295-1300.)

The respondent also states: "[T]he conflict precluded Mr. Adams from even considering putting Mr. Bad Horse on the stand to elicit his testimony about the crime. Nor as he admitted, could he consider calling Travis Holliday to implicate him along with Bad Horse." Respondent's Brief at 6-7. These statements are made without citation to the record and the petitioner can locate no support for them in the record.

The respondent further indicates that a defense implicating Bushman, Bad Horse and Holliday exonerated Gary Radi in Radi's trial (Respondent's Brief at 7),

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[1] Bushman was the primary target of Adams' strategy of shifting blame for obvious reasons – he was the conspirator who had agreed to testify against his coconspirators. Adams was also pursuing the defense tactic Fitzpatrick preferred – targeting Bushman and Kraft as the culprits. Petition App. at 223.

while blithely ignoring the fact that nothing in the record tells us what Radi's defense at trial was. What we do know is that there had been a dearth of witnesses at Radi's trial.[2] (Petition App. at 190-91.) The respondent's continuing distortion of the record illustrates the need for review of this case.

The decision of the Court of Appeals is based on misconstrued facts, and it also conflicts with opinions of this Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Burger v. Kemp*, 483 U.S. 776 (1987). An objective, accurate review of the historical facts in this case supports a finding of a potential conflict, not a finding of an actual conflict of interest. This Court held in *Cuyler*, 446 U.S. at 350, that the possibility of a conflict is insufficient to impugn a criminal conviction. The opinion of the Court of Appeals sets forth facts and case law establishing that a potential conflict existed, and then incorrectly jumps to the conclusion that Adams actively represented conflicting interest. In *Burger v. Kemp, supra*, this Court rejected an ineffective assistance claim based on an alleged conflict of interest where two law partners (considered as one attorney) represented Burger and a codefendant charged with capital murder. This Court held that any overlap of counsel did not so infect the representation of Burger as to constitute an active representation of competing interests. Nor was an actual conflict established by the fact that Burger's attorney, who prepared the appellate briefs for both codefendants, did not make a "lesser culpability" argument in Burger's brief on his second

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[2] Bushman, Christine Fetters, Iva Lee Finch, and Cindy Morgan did not appear at Radi's trial. (Petition App. at 190-91.)

appeal to the Georgia Supreme Court. This Court found that decision had a sound strategic basis and was not attributable to the fact that his partner was the codefendant's lawyer or to the further fact that he assisted his partner in the codefendant's representation. Under the reasoning set forth in *Burger,* Adams' representation of Fitzpatrick after his representation of Bad Horse had ended did not constitute an actual conflict of interest. The Court of Appeals attributed Adams' motive for not using the Iva Lee Finch statement to a conflict. In fact, there is no evidence that Adams did not use the Finch statement because he was trying to protect Bad Horse. He did not recall the statement and he did not believe it was significant. The record shows that Adams made valid strategic decisions in defending Fitzpatrick, decisions which were not the result of any conflict of interest. The Court of Appeals misapplied the law to the historical facts when it found Adams operated under an actual conflict of interest.

This case warrants review by this Court.

Respectfully submitted,

MARC RACICOT
Attorney General
KATHY C. SEELEY*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401
(406) 444-2026

*Counsel of Record

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